T.C.S. v. DIRECTOR-GENERAL OF INLAND REVENUE

[F.C. (Gill C.J., Ong Hock Sim and Raja Azlan Shah F.JJ.) June 25, 1977]

[Alor Star — Federal Court Civil Appeal No. 109 of 1976]

Revenue Law — Income Tax — Purchase and sale of land — Whether adventure or concern in the nature of trade — Liability to tax — Income Tax Act, 1967, s. 4(a).

In this case the appellant had purchased land in Alor Star and after obtaining the permission of the Government to alter the conditions in the land title from agricultural purposes to one of erecting dwelling houses he sold them at a profit. He was assessed to tax on the profit and his appeal to the Special Commissioners and to the High Court ([1977] 1 M.L.J. 34) was dismissed. He appealed to the Federal Court.

Held, dismissing the appeal: both the Special Commissioners and the learned judge were right in holding that the only reasonable inference from the facts and the surrounding circumstances of the case was that the acquisition by the appellant of the piece of land and its sale not long afterwards was an adventure in the nature of trade.

Cases referred to:-

(1) *Leeming* v. *Jones* (1928-31) 15 T.C. 333.

(2) *E.* v. *Comptroller-General of Inland Revenue* [1970] 2 M.L.J. 117, 122.

(3) *Commissioners of Inland Revenue* v. *Livingston & Ors.* 11 T.C. 538, 542.

(4) *California Copper Syndicate* v. *Morris* 5 T.C. 159.

(5) *Eames* v. *Stepnell Properties* [1966] T.R. 67 aff. C.A. [1966] T.R. 347.

(6) *Rentledge* v. *Commissioners of Inland Revenue* 14 T.C. 490, 496.

FEDERAL COURT.

Lim Ewe Hock for the appellant.

Abdul Rashid (Senior Federal Counsel) for the respondent.

Gill C.J. (Malaya): The question to be decided in this appeal is whether the purchase and sale by the appellant of land held under Surat Putus Kechik No. 14750 in the Mukim of Alor Malai in the District of Alor Setar in the State of Kedah was an adventure or concern in the nature of trade so as to render the gain or profit of $538,790, which he made from such sale, liable to income tax under section 4(a) of the Income Tax Act 1967.

The Director General of Inland Revenue, the respondent to this appeal, answered the question in the affirmative when he included the said sum of $538,790 under trade income in the assessment of the appellant's income tax for the year of assessment 1974 as per Notice of Additional assessment dated January 18, 1975. The Special Commissioners for Income Tax gave the same answer when they dismissed the appellant's appeal against such assessment, and Syed Agil Barakbah J. did likewise in dismissing the appeal from the decision of the Special Commissioners by way of case stated to the High Court. The appellant has now brought this further appeal to this court.

The primary facts as found by the Special Commissioners are not in dispute. The appellant, who carries on business as a sundry shopkeeper as well as a licensed moneylender in Alor Setar, agreed to purchase the land in question from one Madam Soh Tuan (hereinafter referred to as "the Vendor") by a written agreement dated September 3, 1961 (hereinafter referred to as "the first agreement"). The agreed purchase price was $31,500 of which a sum of $9,000 was paid upon execution of the agreement and the balance was to be paid within eight months. Under clauses 4, 5 and 6 of the agreement, the Vendor undertook (a) to obtain Government permission for alteration of the condition in the land title from that for agricultural purposes to one for the exclusive purpose of erecting dwelling houses, (b) to apply to the Town Council for approval to erect houses on the land and (c) to take steps within eight months to effect the removal of the four existing houses on the property. Clause 8 of the agreement provided that in the event of her being unable to comply with the above undertakings, the Vendor was to refund to the appellant the deposit of $9,000 and the agreement was to be treated as void and of no effect.

The Vendor was unable to fulfill any of her undertakings within the stipulated period. On July 4, 1963 her solicitor informed the appellant that as she was unable to obtain the necessary approval from Government to change the condition of tenure of the property she would like to treat the agreement as null and void and refund the deposit of $9,000 to him. The appellant took no steps to treat the agreement as void and to take back his deposit. After an exchange of a series of letters between the solicitors for the parties from July 18 to August 4, 1964, a new agreement was entered into between them on March 9, 1966 (hereinafter referred to as "the second agreement").

The purchase price under the second agreement was the same as under the first agreement but a sum of $13,309.05 was paid in part payment of the purchase price, and the balance of $18,190.55 was to be paid within three months. Clauses 4 and 5 of the second agreement reproduced word for word clauses 4 and 5 of the first agreement. In clause 6 of the second agreement the period for removal of the existing houses was stipulated as three months. Clause 8 of the second agreement was similar to that of clause 8 in the first agreement.

The Vendor was again unable to fulfill the conditions in the second agreement. Nevertheless, the appellant sued the Vendor in the High Court at Alor Setar for its specific performance. He filed two civil suits, being Civil Suit No. 133 of 1966 and Civil Suit No. 114 of 1968. In compliance with an order made in Civil Suit No. 114 of 1968 on July 11, 1971 the Vendor executed a registrable transfer of the land in favour of the appellant who became the registered owner of the property on August 10, 1971.

On September 13, 1971 the appellant himself applied to the State Government for alteration of the condition of the tenure of the property. On February 18, 1973 he was informed by the Collector of Land Revenue Kota Setar that his application had been approved. On April 15, 1973 he entered into an agreement for the sale of the property to a limited liability company by the name of Chai Hup & Sons Sendirian Berhad for the sum of $580,000 which was paid by the company in shares equivalent in value to that sum. The appellant later transferred those

shares to his wife and children, and he himself became a director of the company without any shareholding qualification under Article 71 of the Articles of Association of the Company.

I would pause here to observe that on the vendor being unable to fulfill her undertakings under both agreements the appellant did not choose to treat the agreements as null and void. He sued for specific performance of the second agreement and accepted a transfer of the property to himself notwithstanding the non-fulfilment of those undertakings.

At the hearing of the appeal before the Special Commissioners it was contended on behalf of the appellant that his intention was to purchase the property and keep it for his old age and for his family. It was emphasised that his intention when he entered into the first agreement was very relevant. It was further submitted that, assuming that the appellant bought the property as an investment and later realised such investment, the profit which he made was capital appreciation and therefore not assessable to income tax. Alternatively, it was submitted that assuming that the appellant had purchased the property with a view to resale it would be assessable to income tax only if he had done something to the property before selling it. It was lastly submitted that on the facts there existed only an adventure but not an adventure in the nature of trade.

The contentions on behalf of the respondent were as follows. Intention to make a profit, though immaterial, was very relevant in deciding whether it was an adventure in the nature of trade or otherwise. The appellant would have sold the property in 1963 if the vendor had been successful in obtaining the alteration in the tenure of her property. The fact that it was an isolated transaction did not preclude the possibility of the transaction being an adventure in the nature of trade. On consideration of the factual evidence, the documents produced and the conduct of the appellant, there were sufficient grounds for the Special Commissioners to come to a decision that there was an adventure in the nature of trade. The sale of the property to Chai Hup & Sons Sendirian Berhad was therefore an adventure or concern in the nature of trade within the meaning of section 4(a) of the Income Tax Act, 1967 read with the definition of "business" under section 2 of the Act.

After giving due consideration to the evidence adduced before them and in the light of the submissions made on behalf of the parties, the Special Commissioners arrived at the decision that the profit which the appellant made on sale of the property was assessable to tax as it constituted income in respect of gains or profits from an adventure in the nature of trade within the meaning of section 4(a) of the Income Tax Act, 1967. In arriving at their decision what was paramount in their minds was the intention of the appellant when he entered into the two agreements of sale, which could of course only be ascertained from his conduct subsequent to September 3, 1961.

As regards the surrounding circumstances, what the Special Commissioners said in the case stated may be summarised as follows. The land was padi land about 1½ miles from the centre of the town of Alor Setar. The appellant admitted in evidence that he wanted to buy the sort of land which could be used for housing development. That was the reason he gave for the inclusion of clauses 4, 5 and 6 in the first agreement. That was also the reason why he paid three times the value of the land as padi land. When the vendor was unable to fulfill the conditions under those clauses of the agreement, the appellant did not treat the agreement as null and void. He was not willing to accept a refund of the deposit but was prepared to complete the purchase. In fact he instructed his solicitors to say that he was prepared to wait for a further period to enable the Government to consider or reconsider the vendor's application for the change of condition in the tenure of the land. He was even ready to make such application himself. The second agreement contained the same conditions as the first agreement. Five weeks after he became the registered owner he himself applied to the State Government for alteration in the condition of the tenure of the property. Before he became the registered owner he paid monetary compensation to the occupiers of the four houses on the land.

Perhaps it might be useful to reproduce what the Special Commissioners have said in the case stated as regards their conclusion from the evidence before them. This is what they said:

> "After hearing the appellant and observing his demeanour when giving evidence we were convinced that the appellant had no doubt at all in his mind that the property had great development potential from as early as September 30, 1961, and that it was not his intention to purchase the property and keep it for his old age and in the meantime collect whatever rents or other forms of income from the property until he had enough funds of his own to develop it.
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> On the above facts as set out and the surrounding circumstances we come to the conclusions that the appellant was very keen to buy the property and re-sell it as soon as he could at a great profit right from the year 1961, and that he pursued doggedly on with his intention to develop the property by erecting houses on it until it culminated in the order of the High Court at Alor Star directing the vendor to transfer the property to himself.
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> We were on the evidence also convinced that the appellant took accelerated steps towards that development after he was successful in his application for alteration of the condition of tenure for by that date the whole of the property consisted, according to the report of Messrs. C.H. Williams & Co. (Sdn.) of a 'long strip of vacant land surrounded by residential development of semi-detached and terrace houses.'
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> We were also convinced, on the whole of the evidence, that if the vendor had succeeded in her application for change of condition of tenure in 1963 the appellant would have made the same moves in 1963 as he did in 1973 to immediately develop the property and realise a substantial profit."

It was contended on behalf of the appellant before the Special Commissioners that the sale of the property by the appellant was an isolated transaction and that not even one of the four conditions approved in *Leeming* v. *Jones*[1] as to the existence of an adventure in trade had been established. The Commissioners rejected this contention on the ground that the only reasonable conclusion they could arrive at was that this isolated transaction was an adventure or concern in the nature of trade.

As regards the appeal from the Special Commissioners to the High Court, the learned judge first dealt with the fundamental principle, which is the crux of the matter in this appeal, that a single isolated trans-

action can properly be regarded as an adventure in the nature of trade where land is purchased with the intention of selling it at a profit, but not where the property is purchased as an investment and the taxpayer has no initial intention of selling it for a profit. In this connection he considered a number of decided cases to some of which I shall refer later in my judgment.

He next proceeded on the basis that the court will not disturb any finding of pure facts unless there is no evidence to justify the findings or where incorrect reasons of law prompted their conclusion of fact, and where the Commissioners have taken an erroneous view as to the nature and effect of a document, or have applied erroneous tests in arriving at their conclusion or have otherwise misdirected themselves in law or drawn a wrong inference from the facts.

After a careful study of the facts which were not disputed, the contentions of the appellant and the respondent and the grounds and conclusions of the Special Commissioners appearing in the record, the learned judge formed the opinion that the Special Commissioners proceeded in the right direction by treating the question of intention of the appellant as ascertained by his subsequent conduct as being of paramount importance.

As the learned judge has stated in his judgment, each case of course depends on its facts and the surrounding circumstances which have to be considered as a whole. As regards the facts and the surrounding circumstances of this case he expressed his opinion as follows: —

"I find that the Special Commissioners in coming to their conclusion have fully considered those facts and circumstances, adopted the correct test and principles, and concluded by way of logical and reasonable inference that the isolated transaction was an adventure in the nature of trade. The full facts and exhibits were at their disposal and from there they took into consideration the circumstances of the purchase including the appellant's conduct which invariably led to the only irresistible inference that his intention and object was to sell the land at a profit and not to keep it and enjoy the income for his old age."

He then stated that it was manifest that the appellant's intention to sell the property at a profit never changed.

The conclusion at which he arrived and on the basis of which he dismissed the appeal is stated in his judgment as follows: —

"In the circumstances I cannot regard the transaction as an investment and/or the profit from the sale to amount to a capital appreciation. It seems to me that the only conclusion on the facts as found by the Special Commissioners is that the appellant acquired the land with the expectation and intention of selling it at a profit and that was an adventure in the nature of trade."

The sole ground on which the appeal has been brought to this court is that the learned judge was wrong in holding that the solitary transaction of selling the land was an adventure in the nature of trade. Counsel for the appellant handed in a lengthy written submission containing passages from decided cases which, in his opinion, are relevant to this appeal. His main submission, however, is that in arriving at their decision that the transaction was an adventure in the nature of trade, the Special Commissioners and the learned judge misdirected themselves in law by concerning themselves exclusively with the question as to what the intention of the appellant was at the time he entered into the agreement for sale, and in failing to consider whether the solitary transaction, if it was an adventure, was an adventure in the nature of trade.

Taking the second point first, there is ample authority for the proposition, which I stated in *E.* v. *Comptroller-General of Inland Revenue*,[2] that whilst a trade usually consists of a series of transactions implying some continuity and repetition of acts of buying and selling or manufacturing and selling, the mere fact that there is only one transaction does not preclude the possibility that that transaction is in the nature of trade.

It is contended on behalf of the appellant that none of the four conditions laid down in *Leeming* v. *Jones*[1] was present in this case. The Special Commissioners thought that they were present, but the learned judge took the view that only two of those conditions were present. The appellant in this case was a shopkeeper. He was carrying on trade in sundry goods. It was, therefore, not necessary for him to set up a separate organisation for the purpose of trading in land. There is certainly evidence of activities which led to the maturing of the assets to be sold, and the nature of the asset lent itself to commercial transactions. The appellant took steps to effect removal of the four houses on the land. He had the land valued and he made a successful application for conversion of the land from agricultural land to land for building purposes. The land was surrounded by a newly developed housing area so as to lend itself to commercial transactions. In any event, the question here is not whether the appellant's isolated speculation was a trade, but whether it was an adventure in the nature of trade.

In *Commissioners of Inland Revenue* v. *Livingston & Ors.*,[3] Lord President Clyde said: —

"I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, 'in the nature of trade', is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as 'in the nature of trade', merely because it was a single venture which took only three months to complete."

I think the point is very well illustrated by the facts in such cases as *California Copper Syndicate* v. *Morris*,[4] and *Eames* v. *Stepnell Properties Ltd.*[5] Perhaps I should add that the facts here are not very different from the facts in *E.* v. *Comptroller-General of Inland Revenue*[2] in which this court held that the transaction there at issue was an adventure in the nature of trade.

As regards the question of intention, in *Rutledge* v. *The Commissioners of Inland Revenue*[6] Lord President Clyde had this to say:

"It has been said, not without justice, that mere intention is not enough to invest a transaction with the character of trade. But, on the question whether the Appellant entered into an adventure or speculation, the circumstances of the purchase, and also the purchaser's object or intention in making it, do enter, and that directly, into the solution of the question."

To use the words of the learned Lord President further down in his judgment in the same case, it is no doubt true that the question whether a particular adventure is in the nature of trade or not must depend on its character and circumstances, but if, as in the present case, the purchase is made for no purpose except that of resale at a profit, there seems little difficulty in arriving at the conclusion that the deal was in the nature of trade, though it may be wholly insufficient to constitute by itself a trade.

In my judgment, both the Special Commissioners and the learned judge were quite right in holding that the only reasonable inference from the facts and the surrounding circumstances of the case was that the acquisition by the appellant of this piece of land and its sale not long afterwards was an adventure in the nature of trade. I would therefore dismiss the appeal with costs.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Lim Ewe Hock.*

MALAYAWATA STEEL BERHAD v. GOVERNMENT OF MALAYSIA & ANOR.

[F.C. (Suffian L.P., Raja Az'an Shah and Wan Suleiman F.JJ.) June 29, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 108 of 1974]

Equity — Equitable assignment — Assignment of right to receive payment from respondent for steel supplied by appellants to construction company — Assignment conditional, non-absolute and severable — Assignment enforceable only where respondent instructed by construction company to make payment direct to appellants — Assignment unenforceable.

This was an appeal from the decision of Mohamed Azmi J. ([1975] 1 M.L.J. 22). The appellants had claimed payment of the sum of $215,618.68 being the balance of payment due for the supply of steel to a construction company for the Radio House project of the Government. The claim was based on an equitable assignment alleged to have been made in favour of the appellants with the construction company as assignor and the Government as the debtor. The Government had agreed to pay the cost of steel supplied direct to the appellants, if so directed from time to time by the construction company. The learned trial judge dismissed the claim and the appellants appealed to the Federal Court.

Held, dismissing the appeal: (1) the arrangement in this case was not absolute and therefore not a valid equitable assignment but merely a request to the respondents to pay the appellants. Such a request or authorization did not give the appellants any rights against the respondents and could be revoked by the creditor, the construction company;

(2) the learned judge was right when he said that the assignment was enforceable only on an *ad hoc* basic whenever the P.W.D. was instructed by the construction company to make the payment direct.

Cases referred to:-

(1) *Williams Brandt Sons & Co.* v. *Dunlop Rubber Co.* [1905] A.C. 454, 462.

(2) *Re McArdle's case* [1951] 1 All E.R. 905.

(3) *Durham Brothers* v. *Robertson* [1898] 1 Q.B. 765.

(4) *Tancred* v. *Delagoa Bay and East African Railway* (1889) 23 Q.B.D. 239.

(5) *Ex parte Hall, In re Whitting* (1878) 10 Ch. D. 715.

(6) *Coulls* v. *Bagot's Executor and Trustee Co. Ltd.* [1967] A.L.R. 385.

FEDERAL COURT.

Chin Yew Meng for the appellants.

Fong Seng Yee (Senior Federal Counsel) for the respondents.

Raja Azlan Shah F.J.: The appellants supplied steel bars to the builder, NKHC. The question on the appeal was whether the arrangement contained in the letters of July 20, 1968, August 8 and 10, 1968 and September 13 and 18, 1968 made between NKHC, the appellants, and J.K.R. ("the respondents") was a valid equitable assignment by NKHC to the appellants of all monies due to NKHC from the respondents. If it was not, that was the end of the matter. If it was, then a further question arises as to the quantity of steel bars supplied and their value.

The circumstances under which this litigation arose were as follows. NKHC had contracted with the respondents to construct a Radio House, two office towers and a large auditorium at Bukit Putri, Kuala Lumpur, for the sum of M$7,870,013.95. That contract was entered into in January 18, 1967. By exchange of letters dated June 25, July 2, and July 25, 1968 the appellants agreed to supply NKHC with steel bars and the terms of payment were by way of irrevocable 120 days letter of credit or by J.K.R. guarantee. These terms, which was the issue in the present dispute, were subsequently modified by the parties *vide* the exchange of letters.

On July 20, 1968 NKHC wrote to appellants "in respect of the term of payment for your above steel supply will be accepted if the P.W.D. is authorised to deduct the amount from our interim payment and made direct to you instead of a J.K.R. guarantee."

On the same day NKHC wrote to J.K.R. with a copy to appellants regarding the alternative arrangement of payment as agreed between NKHC and appellants; the letter reads, *inter alia*:

"In this connection, we hereby agree to authorize the P.W.D. to deduct from our progress payment and make direct payment to Malayawata Steel Berhad on the amount of steel supplied for the above project. We would like to have your written confirmation with a copy to Malayawata Steel Berhad that the P.W.D. can arrange the above."

J.K.R. replied in August 8, 1968, *inter alia*, as follows:

"2. Your request has been considered by the Treasury and has been approved. However, please note that for *purpose of progress payments*, the deformed steel bars (whether as unfixed materials on site or incorporated in the works) will be valued in accordance with the conditions of contract. To assist the Quantity Surveyor in assessing the quantities of steel brought on to the site, please arrange for copies of Malayawata's delivery notes of the steel to be sent to this office."

On August 10, 1968 NKHC confirmed by letter to J.K.R. that they were agreeable to the J.K.R.'s suggestion contained in para. 2 above.

On September 13, 1968 NKHC again reminded the appellants of their new arrangement with regard to the method of payment. The final paragraph of the letter reads: